

Julia Mendoza et al.

Petitioners

v.

Republic of Mekinés

State

MEMORIAL FOR THE STATE

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II. STATEMENT OF FACTS

The population of the Federal Republic of Mekinés (Mekinés) is large and diverse, with 55% of the country's 220 million inhabitants identifying as African descendant.¹ There is a large Christian majority comprising 81% of the population, while 2% practice an African faith.² Under Article 5 of the Constitution, equal protection of human rights is guaranteed.³ While Mekinés is secular under Article 3 of the Constitution, it is also a democratic state and as such, the three branches of government inevitably reflect the traditional Christian beliefs held by wider society.⁴ A media conglomerate oversees most media and disseminates these traditional views on family and religion.⁵ Due to their polytheistic nature, lack of core text and structure, minority faiths such as Candomblé are not recognized as religions by the Supreme Constitutional Court.⁶ However, steps have been taken to tackle intolerance in the country, such as the establishment of a National Committee for Religious Freedom, and positive action measures for African descendant people.⁷

Helena Mendoza Herrera is the child of Julia Mendoza and Marcos Herrera, who have been separated since 2017. Before domestic proceedings began, Mr. Herrera frequently saw his daughter and approved of Ms. Mendoza raising her to follow her religion, Candomblé.⁸ However, in 2020, when Helena was 9 years old, she went through the intense initiation into Candomblé, which involved animal sacrifice, the shaving of her head, scarification of her skin with fish bones and

¹ Hypothetical, §§1, 4.

² Hypothetical, §12.

³ Hypothetical §§4, 6.

⁴ Clarification Question (CQ) 4.

⁵ Hypothetical, §35, CQ31.

⁶ Hypothetical, §17.

⁷ Hypothetical, §15, CQ40.

⁸ Hypothetical, §28.

Recogimiento a period of confinement lasting 21 days. Following this initiation and after Ms. Mendoza's partner Tatiana Reis had moved into their apartment, Mr. Herrera reported the couple to the local Council for the Protection

Racial Discrimination, and Related Forms of Intolerance (CIRDI), and recommended a review of Mekinés' judicial practices and full implementation of righ

IV. LEGAL ANALYSIS

A.

herself in a grave situation where she would be exposed to an imminent risk. Hence, there is no element of urgency present in the case at hand.

Third and lastly, there is no risk of irreparable harm when Helena stays with her father as none of her rights as a child are compromised.²⁴

domestic law have been pursued and exhausted in accordance with generally recognized principles of international law.²⁶

Mekinés waived its right to preliminary objections and therefore its legal consequences are irrelevant in this instance²⁷ as Article 8(1) was not included in the petition sent by the Commission to Mekinés.²⁸

The alleged violation under Article 8(1) ACHR established by the Commission is inadmissible as Ms. Mendoza and Ms. Reis did not use the domestic procedures before the National Council of Justice to challenge the alleged partiality of the judges before filing a petition with the Commission.²⁹ The investigation of the National Council of Justice is still ongoing and has not given any conclusion.³⁰ Hence, the domestic remedies are not exhausted.

Considering the foregoing, Mekinés asks the Court to declare the alleged violation under Article 8(1) ACHR inadmissible.

2. No jurisdiction *ratione personae* (o)-4npunonotioriclw 19. 13ri

and freedoms of specific individuals, not to resolve abstract questions. This falls under its advisory jurisdiction.³²

In this regard, Mekinés notes that the petitioners did not suffer any concrete disadvantage to their rights as protected under Article 13(3) ACHR. There is no causal link between the mere existence of the media conglomerate and any negative effect on the petitioners' right to seek, receive and impart information. Any claim that the petitioners were negatively affected because the media allegedly influenced the Supreme Court judges

Consequently, Mekinés has not violated Article 8(1) of the Convention ~~Article~~ ~~Articles~~ 1 and 2 ACHR.

3. Mekinés did not violate Article 7(1) *juncto* Articles 1 and 2 ACHR

According to Article 7(1) of the Convention, “Every person has the right to personal liberty and security.”

monopolies or oligopolies in media if these impeded the free communication and circulation of ideas and opinions.⁴⁶

The Mekínésian media is overseen by a conglomerate of five families who manage print, television and digital media information, with one family also owning a radio channel.⁴⁷ There is a legal framework that favors the free expression of ideas, as there are no regulations in place that would restrict companies in the dissemination of information. Social media and radio are also freely available in Mekinés. It would therefore not be correct to state that communication and the circulation of ideas and opinions is impeded in Mekinés. This contrasts with what happens in other countries of the continent.⁴⁸

In conclusion, Mekinés did not violate Article 13 juncto Articles 1 and 2 ACHR.

5. Mekinés did not violate Article 19 *juncto* Articles 1 and 2 ACHR

Under Article 19 ACHR, every child has the right to measures of protection required by his condition as a minor on the part of his family, society, and the State.⁴⁹ This implies that a heightened protection is granted to children because of their vulnerability. Enhanced and adjusted measures are thus required. Consequently, Mekinés must adopt positive measures to ensure the effective exercise of the rights of every child.⁴⁹

⁴⁶ Advisory Opinion OC5/85, Compulsory membership in an association prescribed by law for the practice of journalism, IACtHR, (1985), para. 56.

⁴⁷ Hypothetical, §24; CQ31.

⁴⁸ Granier et al. v. Venezuela, IACtHR, 22 June 2015, para. 171.

⁴⁹ The "Juvenile Reeducation Institute" v. Paraguay, IACtHR, 2 September 2004, para. 160.

For the interpretation of the protection due to children under Article 19 ACHR, the Inter-American Commission on Human Rights (IACHR) relies on a “very comprehensive corpus juris for the protection of the child, including the UN Convention on the Rights of the Child (CRC) as its principal reference for the interpretation and places the aforementioned CRC’s four guiding principles – the best interests of the child; non-discrimination; child participation; and survival and development at the center of its jurisprudence. Article 3 CRC reaffirms that the best interests of the child shall be a primary

Violence has been defined as the intentional use of physical force against a child that has a high likelihood of resulting in potential harm to health.⁵² According to the CRC Committee, violence includes harmful practices such as scarring and violent initiation rites.⁵³

The Candomblé initiation ritual Helena underwent involved the shaving of her head, putting her in a bloodbath and throwing blood on her face. Even more, she was also on her arms and head using fish bones and she was confined for no less than 21 days.⁵⁴ The scars inflicted constitute permanent harm. By using unsanitary fish bones, there is a genuine risk of the wounds getting infected,⁵⁵ or of a transmission of diseases as a result of the scarring procedure.⁵⁶ Clearly, these practices have a high likelihood of resulting in negative consequences for Helena, including physical, psychological and social harm. As being exposed to violence at such a young age could make children more vulnerable for future instances of violence.⁵⁷

Hence, by awarding custody to Mr. Herrera, Mekinés complied with his positive obligations in light of Article 19 ACHR juncto Articles 19 and 24(3) CRC.

5.2. The Supreme Court of Mekinés duly considered the best interests of the child

When assessing the child's best interests, certain elements must be considered: its identity, the preservation of the family environment, its right to education, its safety, its vulnerability and its right to health.

A first element that must be taken into account is the child's identity.⁵⁸ Religious and cultural values and traditions are part of the child's identity, however, these cannot be incompatible with the rights protected under the CRC or the child's best interests.⁵⁹ As established above, the practices of scarification⁶⁰ are undoubtedly inconsistent with Helena's rights as protected under the CRC and can therefore not be in her best interest. Hence, when determining her best interest, the preservation of Helena's religious and cultural values and traditions cannot outweigh the violence done to her.

A second element to consider is the preservation of the family environment and the maintenance of the child's relations with its family.⁶¹ According to Article 9(3) CRC, a child separated from one or both parents is entitled to maintain personal relations and direct contact with both parents

⁵⁸ CRC, General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration, para. 55.

⁵⁹ Ibid.

⁶⁰ CQ8.

⁶¹ CRC, General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration para. 60.

scarification frequently leads to infections, especially when not done with proper tools, such as unsterilized fish bones used during Helena's initiation into Candombé.⁷⁵ After the scarification, Helena was confined for 21 days,⁷⁶ which could have made it even more difficult for such wounds to heal properly. Thirdly, confining such a young girl has enormous consequences for her mental health.⁷⁷

In view of the aforementioned elements, it can only be concluded that Mekiés has taken the best interests of the child into account when adjudging the case at hand.

5.3. The right to be heard, to express their views, and to participate in decisions affecting their rights and interest was respected.

There is a clear relationship between the determination of the best interests of the child and the right of the child to be heard.⁷⁸ According to Article 12 CRC, minors have the right to express their views on matters that concern them, with the child's level of maturity being taken into account. Article 12(2) specifically prescribes the right of children to be heard in legal proceedings concerning them, "in a manner consistent with the procedural rules of national law". In Mekiés, Article 43 of the Children's Rights Act explicitly states that children must be heard in custody decisions from the age of 8 and choose which parent to live with from the age of 12.⁷⁹

⁷⁵ CQ8; Babatunde O., Oyeronke A., "Scarification practice and scar complications among the Nigerian Yorubas", p. 571-572; Ludovico L., Kurland R., "Symbolic or Non-Symbolic Wounds: The Behavioral Ecology of Human Scarification.", *Ethology and Sociobiology* 16 (1995), 155-172, p. 160.

⁷⁶ CQ8.

⁷⁷ Office of the Special Representative of the Secretary General on Violence Against Children, *Hidden scars: how violence harms the mental health of children*, 7 July 2022, p16.

⁷⁸ IACHR, *Fulfillment of Children's Rights: National Protection Systems*, 30 November 2017, p20.

⁷⁹ CQ22, CQ28.

they gain personal autonomy.⁸³ As a young girl, the majority of Helena's rights are exercised through her parents. Because of that, the State has the duty to adjust protective measures when the parent(s) fail to take decisions that ensure the child's progressive development. These measures must be taken in accordance with the child's age, level of maturity and experiences.⁸⁴

It is evident that confining an 8-year-old girl for 21 days, shaving her head as a symbol of death and resurrection, scarring her body with fish bones and putting her in a blood bath⁸⁵ causes irreparable harm to that girl. All these practices are traumatic, cause bodily harm, mental stress and cognitive impairment, and are detrimental to her physical, mental and moral development.

Regarding the fact that these practices and Ms. Mendoza's influence may have lifelong consequences for Helena's health and development, Mekinés had the positive obligation to take protective measures. By awarding custody to Mr. Herrera, Mekinés complied with its duty under Article 19 ACHR *juncto* Article 6.2 CRC to ensure the development of Helena to the maximum extent possible.

6. Mekinés did not violate Article 12 *juncto* Articles 1 and 2 ACHR

The right to freedom of conscience and religion, enshrined in Article 12 ACHR, is a foundational aspect of democratic society and is closely intertwined with an individual's personal identity and dignity.⁸⁶ Every individual has the right under Article 12(1) ACHR to maintain and change their religion or beliefs, and to assert or share those beliefs. However, this right is not unlimited. Article

⁸³ *Gelman v. Uruguay*, IACtHR, 24 February 2011, para. 129.

⁸⁴ *Atala Rifo and daughters v. Chile*, para. 68; *García and family members v. Guatemala*, IACtHR, 29 November 2012, para. 183.

⁸⁵ CQ8.

⁸⁶ "The Last Temptation of Christ" (*Olmedo Bustos et al.*) v. Chile, IACtHR, 5 February 2001, para. 79; IACHR, *The Inter-American Legal Framework regarding the Right to Freedom of Expression*, 30 December 2009, para. 56.

12(3) of the Convention provides for the lawful limitation of an individual's right to manifest their religion and beliefs when necessary. Several grounds for restriction are given: to protect the safety, order, health or morals of the public or to protect the rights and freedoms of others. Where a restriction is necessary in order to protect the rights of others, the conflicting rights must be balanced against each other. This is a form of proportionality. The IACtHR elaborated on the criteria for balancing competing rights and interests in *Kimel v. Argentina*⁸⁷ where it is stated that must be established whether the impact on the restricted rights was serious, limited, or moderate, how important the conflicting rights are, and whether the "satisfaction of the latter justifies the restriction of the former"⁸⁸ In addition to the proportionality assessment, the overarching principle of the best interests of the child must be considered.⁸⁹

The right of children to freedom of religion is explicitly mentioned in Article 14 CRC. Article 14(2) CRC requires States Parties to respect the rights and duties of parents to provide direction to the child in the exercise of his or her right to freedom of religion in a manner consistent with the evolving capacities of the child. Article 14(3) CRC stipulates that the freedom to manifest religion may be subject to limitations that are prescribed by law and are necessary to protect the
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Following the reasoning of the European Court of Justice in *Centraal Israëlitisch Consistorie van België et al*, specific practices of religion can be lawfully restricted when prohibition is limited to the harmful aspects, and not the entire religious act as such.⁹⁰ Similar to that case, Mekinés does not want to prohibit the initiation itself, merely the aspect of it that causes excessive harm. The initiation ritual into Candomblé includes a three-week period of confinement and the scarring of Helena's skin.⁹¹ Having permanent marks carved into the skin of the head and arms with fishbones and remaining isolated from the outside world would be an intense experience for any individual, but especially for a 6-year old child with a very limited sense of the permanent nature of these scars. Studies have shown that adolescents' attitudes to religion undergo significant changes as they develop.⁹² As she reaches maturity, Helena's attitude to Candomblé could change but she will be physically scarred for the rest of her life.

her mother's custody is not a measure to be taken lightly but is necessary for her to continue to develop in a safe environment where her personal rights are respected. Secondly, Ms. Mendoza's right to provide for the religious education of her child in a manner consistent with her own beliefs is in conflict with Helena's own right to freedom of religion under Article 12 and to her right to physical integrity under Article 5(1) ACHR. Both of these rights are non-derogable and moreover absolutely no restrictions are permitted under Article 5.

Furthermore, the Court has stated that "every human being's possibility of self-determination and free choice of the options and circumstances that give a meaning to his or her existence in keeping with their own choices and beliefs is a vital component of ensuring the personal integrity of the individual."⁹⁵ In Advisory Opinion OC-17/02 on Juridical Condition and Human Rights of the Child, the Court recognized that minors do not have full decision-making capacity as they are lacking in maturity and life experience.⁹⁶ As such, they are "subject to parental authority."⁹⁷ As a young child, Helena is vulnerable. Although she decided to undergo the initiation ritual after speaking to her mother,⁹⁸ her ability to fully understand the long-term consequences of it, specifically the scarification, were limited. Ms. Mendoza failed to responsibly exercise her parental authority and to consider her daughter's right to change her beliefs, should she decide to do so in the future. She did not provide direction to Helena in a manner consistent with her evolving

⁹⁴ Azul Rojas Marín et al. v. Peru, IACtHR, 12 March 2020, para. 140; Valenzuela Ávila v. Guatemala, IACtHR, 11 October 2019, para. 180.

⁹⁵ I.V. v. Bolivia para. 150

⁹⁶ Advisory Opinion OC-17/02, Juridical Condition and Human Rights of the Child, IACtHR, 28 August 2002, para. 41.

⁹⁷ Ibid.

⁹⁸ Hypothetical, §29.

capacities, as required by Article 14(2) CRC. For these reasons, the fulfillment of Helena's rights justifies the limitation of her mother's right to freedom of religion.

The right of both Ms. Mendoza and Mr. Herrera to provide Helena with religious and moral education under Article 12(4) ACHR must also be balanced. As the same right is under consideration, the main issue is the best interests of the child, which is discussed in greater detail above.⁹⁹ Although the rights of all persons concerned must be considered, when the rights of others conflict with those of a child and complete harmonization is not possible, more importance be given to whatever serves the best interests of the child.¹⁰⁰

There is no suggestion that Ms. Mendoza

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circumstances have not shifted towards a general acceptance of different models of family. There are no indications that the population of Mекinés, known to be the largest Christian country in the world,¹⁰⁶ would support nontraditional conceptions of family. As stated by Judge Pérez Pérez; 'The irrefutable fact that there are currently many different concepts of 'family [...] does

or stable de facto union between a man and a woman.¹¹⁰ The constitutions of many other States Parties contain similar provisions.¹¹¹ As a consequence of this highly cultural connotation of the family, national regulations show varying degrees of tolerance for alternative family models. By

Therefore, Mekinés did not violate Article 17 ACHR.

8. Mekinés did not violate Article 24 *juncto* Articles 1 and 2 ACHR

Article 24 ACHR protects the right to equality before the law and equal protection of the law. It is a fundamental element of international law¹¹⁵ which the Court has recognized as a norm of *jus cogens*.¹¹⁶ Due to the obligations under Article 2 ACHR, this duty also extends to the decisions of the Courts.¹¹⁷ The prohibited grounds of discrimination, such as race, religion or economic status, are found in Article 1(1) ACHR, and can be applied in the context of Article 24. Yet, this list is not exhaustive, and grounds such as sexual orientation have also been found to be protected by the ACHR.¹¹⁸

8.1. The decision was not based on Ms. Mendoza's race or religion.

In this case, the decision of the Supreme Court made a careful assessment of relevant factors that would impact Helena's quality of life. Ms. Mendoza's race was not taken into consideration by the Courts, and would never be a deciding factor in a diverse country such as Mekinés.

The mere adherence to the Candomblé religion in itself was not taken into account. Only the bodily harm inflicted on a 8-year-old child was carefully considered, which is also why no proceedings were ever initiated during the time Ms. Mendoza was raising Helena in the teachings of

Since Ms. Mendoza's and Ms. Reis' sexual orientation was not a determining factor, Mekinés did not discriminate based on this ~~criteria~~.

8.3. Basing the decision on socioeconomic status and harm done to the child was justified

The IACtHR has stated that not all differences in legal treatment are discriminatory, and that objective and reasonable justifications can exist for differential treatment.¹²⁴ It has also recognized that the best interests of the child are a compelling aim to pursue.¹²⁵ In interpreting the best interests, it is pertinent to look at the General Comments of the CRC Committee. The CRC Committee has stated that the development of a child includes the rights of that child to a healthy and safe environment and to education.¹²⁶

Mr. Herrera proved to the Supreme Court that the school he enrolled Helena in had a better academic rating. Due to the violent aspects of Helena's initiation, the Supreme Court also considered that Mr. Herrera offered her a much safer environment. Mekinés recognized the Supreme Court took the economic status of Mr. Herrera, Ms. Mendoza and Ms. Reis into account. It had to evaluate which parent was better suited to take care of Helena, and it would not have been in the best interest of the child to ignore the material circumstances of the parents in this decision. Mr. Herrera's house has a beautiful room for Helena, as opposed to Ms. Mendoza's apartment which only has one bedroom. In this respect, the distinction made on economic status was justified by objective and reasonable elements.

¹²⁴Advisory Opinion OC4/84, Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica, para. 56.

¹²⁵Atala Riffo and daughters v. Chile, para. 108.

¹²⁶CRC, General Comment No. 7, Implementing child rights in early childhood, para. 10.

Mekínés would like to reiterate the subsidiary nature of the IACtHR in this case, as it is not the purpose of the Inter-American human rights system to examine

As discussed above, the Supreme Court was in no way influenced by considerations of Ms. Mendoza's race.¹³⁰ The fact that Candomblé religion is of African origin did not matter, since the Mekinés Supreme Court would consider physical harm done to children as a factor in custody proceedings in any religion, regardless of racial origin.

9.2. No indirect discrimination

Article 1(2) CIRDI defines indirect racial discrimination as a practice that has the capacity to entail a particular disadvantage for persons belonging to a specific group based on the reasons set forth in Article 1(1), or puts them at a disadvantage. In *L.R. v. Slovakia*, the Committee on the Elimination of Racial Discrimination (CERD), clarified that measures which are not discriminatory at face value but are discriminatory in fact and effect, can amount to indirect discrimination.¹³¹ However, there is no indirect discrimination when said practice has a reasonable and legitimate objective or justification under international human rights law.

Any argument that the judgment of the Mekinés Supreme Court would lead to indirect discrimination of people of Afro-descent must not be accepted. While it is true that the decision in this case pertains to Candomblé specifically, the judgement concerns a single aspect of a single religion. There is no evidence to suggest it would result in higher levels of discrimination against Afro-descendant people.

The decision was, however, based on the .DI

limited scope: it was taken in the specific case of Helenajr another cases a combination of factors could lead to different outcomes.

9.3. Mekinés did not violate Article 4(ix) and (xii) CIRDI

Under Article 4 CIRDI, subsection (ix) forbids any restriction or limitation on the use of the language, traditions, customs, and culture of persons in public or private activities, and subsection (xii) forbids the denial of access to social, economic and cultural rights on a racially discriminatory basis. In interpreting the scope of these obligations, Article 5(e)(vi) of the International Convention on the Ei-26.6o9Ss t(i)-25(e)ll F2(n)2(a)6(tm)2(h)2((R)px)2(Ri)-2a ac dcri-26.6o9S.1(2(i-1.94()-14(5(C

provides. Ignoring this factor would be contrary to the international obligations of Mekinés to guarantee the child's best interest and to guarantee the respect of physical integrity.¹³⁵

9.4. Mekinés did not violate Article 4(i) and (ii)(a) CIRDI *juncto* Article 13(5) ACHR

Article 4(i) CIRDI requires States to prohibit public and private support to racially discriminatory activities, while Article 4(ii)(a) CIRDI requires the State to prohibit the circulation of racially discriminatory materials that incite hatred. The CERD has elaborated on the term incitement, stating that it seeks to influence others to engage in certain forms of conduct, including the commission of crime, through advocacy or threats.¹³⁶ Article 13(5) ACHR requires the criminalization of advocacy for racial hatred that constitutes an incitement of lawless violence. According to the Commission, any conviction of this ground must be backed up by actual, truthful, objective and strong proof that the person was not simply issuing an opinion (even if that opinion was hard, unfair or disturbing), but that the person had the clear intention of committing a crime and the actual, real and effective possibility of achieving this objective.¹³⁷

Some of the Mekinésian media does not always portray the Candomblé religion correctly, and the opinions of executives of certain channels may have been hurtful,¹³⁸ which the State does not condone. This, however, does not translate to incitement of hatred, since there has never been an advocacy for crimes in this media. It would therefore be overstatement to say that Mekinés violated Ms. Mendoza's rights by not interfering.

¹³⁵ Arts. 19 and 5(1) ACHR.

¹³⁶

The obligation under Article 4(i) CIRDI needs to be balanced with Mekinés' obligation to guarantee the freedom of expression under Article 13 ACHR, which is the cornerstone upon which the very existence of a democratic society rests.¹³⁹ This right is not absolute¹⁴⁰ but it also should not be arbitrarily restricted because of statements that "offend, shock or disturb".¹⁴¹

Mekinés is hesitant to interfere with the national media, as State censorship on media is considered a radical suspension of the freedom of expression.¹⁴² It should be remembered that some criticism of Candomblé might be valid to express, even if it is formulated harshly, as harmful initiation rites performed on children should not be considered a normal occurrence in a democratic society. Mekinés has, due to this careful balancing exercise, made sure to offer no specific support to this media. It has clearly taken a position against any racial prejudice that may be issued by these networks, by instituting positive action measures to guarantee independent participation in government, competitions, universities and contracting.¹⁴³

In conclusion, Mekinés did not violate Articles 2, 3 and 4 CIRDI.

10. Mekinés did not violate Article 26 *juncto* Articles 1 and 2 ACHR

The right to cultural life is protected under Article 26 of the American Convention.¹⁴⁴ According to the Commission, the right to freely express their identity in all spheres of cultural life, also

¹³⁹ Advisory Opinion OC5/85, Compulsory membership in an association prescribed by law for the practice of journalism, para. 70.

¹⁴⁰ Art. 13(2) and (4) ACHR

¹⁴¹ Handyside v. UK., ECtHR, 7 December 1976, para. 49.

¹⁴² Alejandra Marcela Matus Acuña et al. v. Chile, October 2005, Case No. 12.142, Report No. 90/05, para. 35.

¹⁴³ CQ40.

¹⁴⁴ Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina, ACHR, 6 February 2020, para. 240.

extends to people of African descent.¹⁴⁵ In interpreting the scope of the right to cultural life, the general recommendations of the CESCR play an important role.¹⁴⁶ The CESCR has established that limitations may be necessary when certain negative practices infringe on other human rights, as long as they are proportionate.¹⁴⁷ The UN Special Rapporteur on Cultural Rights also highlighted the importance of “ensuring that “traditions”, “attitudes” and “customary practices” are not elevated above universal human rights standards.¹⁴⁸

in rights,

V. REQUEST FOR RELIEF